85-1642 (1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. ~~1~~

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1985

BELTON CUNNINGHAM, JR.,

Petitioner,

- against -

SAFEWAY TRAILS, INC., UNITED TRANSPORTATION UNION, WILLIAM C. DIZE, JR., VITO J. RIZZUTO and JOHN J. CARICCHIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

FREDERICK C. HAYES, ESQ.
Attorney for Petitioner
250 West 57th Street
New York, New York 10019
1(212) 582-1265

103 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals, Second Circuit, erred in affirming the judgment of the District Court for the Southern District of New York, which judgment dismissed petitioner's complaint in Title VII action on summary judgment, on the ground that the action was without merit, where said District Court failed to give a preclusive effect to a State Court judgment as mandated by 28 U.S.C. Section 1738.

2. Whether the Court of Appeals, Second Circuit, erred in affirming the judgment of the District Court for the Southern District of New

York, which judgment denied petitioner procedural due process in finding that petitioner had defaulted in answering motions for summary judgment.

*Parties to action same as in caption.

TABLE OF CASES

Allen v. McCurry, 449 U.S. 90 (1980)

Colby v. Klune, 178 F.2d 872 (1946)

Croley v. Matson Navigation Co., 434 F.2d 73 (5th Cir. 1970)

E.E.O.C. v. Southwest Texas Methodist Hospital, 606 F.2d 62 (5th Cir. 1979)

Hayden v. First Nat'l Bank of Mount Pleasant, 595 F.2d 994

Hughes v. International Bhd. of Teamsters, Local 683, 554 F.2d 365 (9th Cir. 1977)

Jones v. Western Geophysical Co., 669 F.2d 280 (5th Cir. 1982)

Pettinaro Construction Co. v. Delaware Authority for Regional Transit, 500 F. Supp. 559 (D.C. Del. 1980)

Pullman-Standard v. Swint, 456 U.S. 273, 288-289, 102 S.Ct. 1781, 1790, 73 L.Ed.2d 66 (1980)

Romero v. Union Pacific Railroad, 615 F.2d 1303 (10th Cir. 1980)

Seymour v. Reader's Digest Association, 493 F. Supp. 257 (S.D.N.Y. 1980)

Sweat v. Miller Brewing Co., 708 F.2d 655, 657 (11th Cir. 1983)

U.S. v. Mitchell, 327 F. Supp 476, 483 (D.C. Ga 1971)

STATUTES CITED

14th Amendment, U.S. Constitution

28 U.S.C. 1254(1)

28 U.S.C. 1738

TABLE OF CONTENTS

Questions Presented..... 2
Opinions Below..... 10
Jurisdiction..... 11
Constitutional Provisions Involved... 12
Statement of Cases..... 13
Background of Decisions..... 18
Arguments..... 19
Point I..... 19
The Courts Below Failed To Give The State Court Judgment Preclusive Effect

Point II..... 31
The Courts Below Erred In Granting Summary Judgment

Point III..... 40
The District Court Failed To Reschedule the Motions For Summary Judgment And Therefore, Petitioner, Under F.R.C.P., Rule 56(c), Did Not Default In Opposing Said Motions And The District Court's Finding To The Contrary Was Error

Reason For Granting The Writ..... 51

Appendix

Decision of Rehearing..... 1-2
Order and Opinion of
Second Circuit..... 3-10
Opinion of District Court..... 11-45

No._____

IN THE
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BELTON CUNNINGHAM, JR.,

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-against-

SAFEWAY TRIALS, INC., UNITED TRANSPORTATION UNION, WILLIAM C. DIZE, JR., VITO J. RIZZUTO and JOHN J. CARICCHIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and The Associate Justices of the Supreme Court:

Frederick C. Hayes, Esq., on behalf of Belton Cunningham, Jr.,

petitions for a Writ of Certiorari to review the judgment of the court of Appeals for the Second Circuit.

Opinions Below

The Order and Opinion of the Court of Appeals for the Second Circuit, Graafeiland, Newman and Miner, Circuit Judges (App. 1-2), denying the Petition for a Rehearing of the Appeal, is not reported.

The Order and Opinion of the Court of Appeals for the Second Circuit, Graafeiland, Newman and Miner, Circuit Judges (App. 3-10), affirming the judgment of the District Court for the Southern District of New York, is not reported (by direction).

The Opinion of the District

Court for the Southern District of New York, granting respondents' motions for summary judgment, dismissing the complaint and awarding Costs and Fees, Carter, J., is not reported. (App. 11-45)

Jurisdiction

The Order of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court for the Southern District of New York, was entered in the Office of the Clerk of said Court on the 19th day of November, 1985 and the Order denying the Petition for Rehearing of the Appeal was

entered in the Office of the Clerk on the 7th day of January, 1986. The jurisdiction of this Court is invoked under 28 SECTION 1254(1).

Constitutional Provisions Involved

The Fourth Amendment to the United States Constitution provides:

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Congress, through the enactment of 28 U.S.C. Section 1738, provided, in relevant part, that:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (emphasis added)

STATEMENT OF CASE

Petitioner was employed by Safeway Trails, Inc., as an "Spareboard"

operator from 1971 through May 12, 1983, when he was discharged for allegedly operating a company vehicle while under the influence of alcohol and speeding, and being involved in an "avoidable accident". Safeway Trails, Inc. (hereinafter "Safeway") terminated petitioner's employment as a result of said charges, predicating its allegations solely upon a Washington, D.C. Police Report which alleged speeding and Driving Under the Influence ("DUI") as being the probable cause of the accident.

Subsequent to the said accident, and prior to the first disciplinary hearing petitioner received

under the National Contract then and there in effect (hereinafter "the Contract"), petitioner appeared before the Superior Court of Washington, D.C., Criminal Division, in response to the Citation issued him for DUI and speeding. Petitioner was exonerated of the charges and the matter was dismissed.

At the first disciplinary hearing with Safeway, the appeal therefrom and in the District Court for the Southern District of New York, petitioner introduced a copy of the State Court judgment exonerating him of the charges of DUI and speeding. At the disciplinary hearing, Safeway dismissed

the judgment as being the product of petitioner's hiring of some "shyster lawyer" in Washington, D.C. to get him off and on the appeal of hearing and in the District Court for the Southern District of New York, the judgment was simply ignored. Judge Carter, in his Opinion (App. 11-45), disposed of the State Court judgment by stating:

> "Even if plaintiff could make out a prima facie case of discrimination, UTU and Dize have clearly demonstrated a legitimate non-discriminatory reason for refusing to arbitrate--plaintiff could provide no friendly witnesses, he could not challenge the breathalyzer results, and he had already lost twice at Safeway hearings with the story he wanted to present yet again. ..." (Id. at pp. 38-39) (emphasis added)

As to Safeway, Judge Carter found:

> "Assuming arguendo that plaintiff could establish a prima facie case of race discrimination (and the court is by no means satisfied that he could), defendant Safeway and its employees have clearly met their burden to articulate legitimate non-discriminatory reasons for plaintiff's discharge.... Plaintiff disappeared with his bus for five hours, he was involved in a serious, preventable accident, and apparently he was speeding and driving while intoxicated. ..." (Id. at pp. 28-29) (emphasis added)

The Court of Appeals for the Second Circuit, in its Order and Opinion affirming the Judgment of the District Court (App. 3-10), found:

"2. In any event, we have reviewed the opposition papers that

Hayes has submitted and conclude that they contain nothing that would preclude the entry of summary judgment for the defendants. Cunningham was discharged because of an episode in which he drove one of defendant's busses while under the influence of alcohol and crashed it into a building. ..." (Id. at pp. 8-9) (emphasis added)

Background of Decisions

The foregoing decisions are allegedly predicated upon the facts of the case, the District Court gleaning its facts from the Rule 3 (g) Statements submitted by respondents which, upon the alleged default in answering the motions for summary judgment, the District Court

deemed the "facts" set forth therein as admitted, while the Court of Appeals reviewed the opposing papers and concluded "that they contained nothing that would preclude the entry of summary judgment for the defendants".

Arguments

Point I

The Courts Below Failed To Give The State Court Judgment Preclusive Effect

Pursuant to the mandate of 23 U.S.C. Section 1738, the Courts below failed to give the State Court judgment a preclusive effect as to the issues of DUI and speeding, the two most crucial issues in the case. By the enactment of

28 U.S.C. Section 1738, state court proceedings are entitled to "full faith and credit" in federal court. For this reason, as well as for reasons of comity and sound judicial administration, state court decisions are awarded preclusive effect. E.g., Allen v. McCurry, 449 U.S. 90 (1980) (state court determination that search and seizure was lawful precludes federal civil rights action against police officers who conducted the search.) As is evident from the opinions of the Courts below, their findings that petitioner was properly discharged rested on the presumption that petitioner operated a Safeway vehicle while under the influence of

alcohol and that he was speeding at the time of the occurrence of the accident. (infra, at pp. 8-9) The Courts below's findings were adverse to the State Court judgment and the findings of the State Court, and their decisions based upon their findings were error, in that said Courts were obliged to accord the State Court judgment "full faith and credit", absent any showing that the State Court proceeding was a complete nullity. The Courts below should have decided the issue of DUI and speeding in favor of the petitioner.

Under the above stated facts, it must be logically concluded that Safeway's discharge of the petitioner

could not have been predicated upon the fact that the petitioner was DUI, or that he was speeding. Safeway's own Safety Reports and investigation negated such a finding and the State Court judgment confirmed those findings. Since the petitioner's discharge could not reasonably be predicated upon DUI or speeding, it must further be logically concluded that Safeway's reasons for discharging the petitioner laid elsewhere and its contention that it discharged the petitioner for said reasons was merely pretextual and the inference of race discrimination is all the more strongly indicated.

As is indicated by the record

below, Safeway failed to call any witnesses to substantiate its allegations, nor did UTU require Safeway to prove its allegations as provided for under the Contract. Safeway had in its possession at the time it discharged the petitioner, allegedly for DUI, speeding and being involved in an "avoidable accident", the following evidence:

a) a Witness Card filled out by an eyewitness, which corroborated the petitioner's account of what led up to the accident;
b) its Safety Directors report which showed that it was a physical impossibility for the petitioner to have attained a speed in excess of the legal limit going into the turn from a dead stop;
c) its own Maintenance Report on the vehicle driven by the petitioner, made the day after the accident, which

clearly showed that the brakes on the left-hand side of the bus were oil-soaked due to a bad seal;
d) its Safety Directors' report which alleged that prior to any repairs being made to the vehicle, they took the bus out and found no defects in the braking system; and
e) a judgment from the Superior Court of Washington, D.C., showing that the allegations contained in the Police Report, relating to the petitioner's alleged DUI and speeding, were found to be unsubstantiate.

Probative of the motivation of Safeway, in discharging the petitioner, was the racially stereotypical attitude it exhibited in its disciplinary hearings. When the petitioner first introduced the Witness Card into evidence, Safeway intimated that said

card was fraudulently procured from one of petitioner's girl friends in Washington, D.C. However, it changed its intimation upon being advised by the petitioner that the witness was a "White" woman. Safeway readily accepted the premise that if the witness was "Black" that a fortiori, it was fraudulent, but upon learning that the witness was "White", the element of fraud evaporated. Similarly, Safeway found the premise, that the petitioner took so long to return the bus to the depot and had not stopped to imbibe alcohol beverages, totally incredible. It would be sheer naivete to not to deduce from Safeway's colored

perceptions, that its decision to discharge the petitioner was racially motivated. Not one iota of credible evidence in the record below, supports Safeway's alleged reasons for discharging the petitioner, on the contrary, all the evidence in its possession pointed out the fallacies in their allegations.

As to UTU and William C. Dize, Jr., (hereinafter "UTU") the record below is even more damning because it clearly shows that UTU failed to carry out its Statutory duty to properly represent and protect petitioner's rights under the Contract, and also unequivocally shows the blatant

extent to which UTU went not to protect petitioner. Under Article 16 of the Contract, the petitioner was entitled to certain protections which UTU arbitrarily and capriciously abdicated. Petitioner was entitled to:

a) a hearing "prior" to his being discharged, as the Contract only permitted summary dismissal of employees who were found to have been operating their vehicle "while intoxicated". Dize, on the disciplinary hearing, pointed this out to Safeway, but failed to pursue the matter any further.

b) To have Safeway lodge its charges against petitioner, in writing, with a copy to the Chairman of the Local

(Dize) and, in not less than five days, nor more than fifteen days, to be given a hearing. Under the Contract, if Safeway failed to adhere to this provision of the Contract, the charges were to be deemed unfounded and dismissed and the employee reinstated with back pay. As is evident from the record below, petitioner was charged, and his employment terminated, by a letter dated the 12th day of May, 1983 and he was not accorded a disciplinary hearing until the 13th day of July, 1983, well beyond the time limitations set forth in the National Contract. Under the Contract, UTU and Dize should have had the charges dismissed against

petitioner and had him reinstated with back pay. UTU and Dize failed to enforce the Contract to the detriment of petitioner.

e) have UTU take petitioner's case to binding arbitration UTU Allegedly Refused because petitioner could not provide it with any friendly witnesses to support his story. This refusal was arbitrary and capricious because 1) petitioner provided UTU and Safeway with a Witness Card, supplied by Safeway to its drivers for just such an eventuality, in which the witness corroborated petitioner' account of his swerving to avoid hitting a youngster on a moped who darted into the path of his

bus and stated that in the opinion of the witness, petitioner had done everything possible to avoid the accident and 2) under the provisions of the National Contract, the burden of proof of the allegations of the charges were the responsibility of Safeway, not of petitioner.

The Contract specifically provided that no complaint was to lie unless the complaining witness appeared and testified at the hearing. It is evident from the disciplinary hearing that the complaining witness to Safeway's charges was the police officer who filed the DUI and speeding charges against petitioner and said police

officer did not appear at the hearing, therefore, Safeway's charges should have been dismissed for its failure to produce the complaining witness. Petitioner was not required to produce any witnesses, as the burden of proving their charges rested exclusively with Safeway. UTU, at said disciplinary hearing, permitted Safeway to utlize the Police Report as a basis for their allegations without requiring Safeway to produce its complaining witness.

Point II

THE COURTS BELOW ERRED IN GRANTING SUMMARY JUDGMENT

UTU's failure to enforce the

terms of the National Contract raised questions as to their motives and intent in failing to do so and placed into question their credibility. It has been held that in Civil Rights cases, where motive, intent and credibility are at issue, that it is inappropriate for a court to grant summary judgment. This Court, in Pullman-Standard v. Swint, 456 U.S. 273, 288-289 (1982), 102 S.Ct. 1781, 1790, 73 L.Ed.2d 66, stated that intent is the ultimate issue of fact to be determined in job discrimination cases. It has also been held that where motive and intent are issue in dispute, summary judgment is inappropriate. EEOC v. Southwest Texas Methodist Hospital,

606 F.2d 62 (5th Cir. 1979); Sweat v. Miller Brewing Co., 708 F.2d 655, 657 (Cir. 1983); Jones v. Western Geophysical Co., 669 F.2d 280 (5th Cir. 1982); Romero v. Union Pacific Railroad, 615 F.2d 1303 (10th Cir. 1980).

In Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, the Court said:

When dealing with employment discrimination cases, which necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party, granting summary judgment is especially questionable. (Id. at p. 997) More specifically, with reference to UTU and

Dize, the Court in Hughes v. International Bhd. of Teamsters, Local 683, 554 F.2d 365 (9th Cir. 1977), found that:

> In an action by a former employee against a former employer and where the union alleged that the employee was wrongfully discharged and where the union refused to pursue the employee's grievance to arbitration, in breach of its duty to fair representation, issues of material fact existed as to whether the union acted in bad faith or in an arbitrary or discriminating manner in following the procedures outlined in the collective bargaining agreement and whether the

collective bargaining agreement itself, as construed and applied by the parties, inherently violated federal labor policy, precluding summary judgment.

The record below clearly establishes that UTU and Dize alleged that petitioner was wrongfully discharged and that they refused to pursue petitioner's grievance to arbitration. Their actions raised material issues of fact which precluded the granting of summary judgment. Similarly, it has been held that as a general rule, summary judgment should not be granted in a job discrimination case if the outcome of the case depends upon the veracity of a witness. Seymour

v. Reader's Digest Association, 493 F. Supp. 257 (S.D.N.Y. 1980); Croley v. Matson Navigation Co., 434 F.2d 73 (5th Cir. 1970). In Croley, Judge Wisdom observed that:

> The Court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of a state of mind. Much depends on the credibility of the witness testifying as to their own state of mind. In these circumstances the jury should be given the opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose state of mind are at issue. (emphasis added) The Second

Circuit, in Colby v. Klune, 178 F.2d 872 (1946) stated:

"We have in this case one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit', improper because there is involved an issue of fact, turning on credibility. Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnessess' demeanor; and that demeanor - absent, of course,

when trial is by affidavit or deposition - is recognized as an important clue to witnesses' credibility. When, as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of summary judgment is error." (emphases added)

From the cases cited herein, it would appear that most of the Circuit Courts who have spoken on this issue of summary judgment in Civil Rights, Cases, and more particularly in cases where motive, intent and credibility are in issue, that the major consensus is that such issues raise triable issues of fact which precludes the granting of summary

judgment. The District Court for the Southern District of New York, in Seymour v. Reader's Digest Association, supra at p. 27, nd the Court of Appeals for the Second Circuit, in Colby v. Klune, supra at p. 26, have previously decided these issues in accordance with the majority of the Circuit Courts. Their decisions in the instant case represents an aberration in that it does not follow their previous determinations. Petitioner respectfully contends that this aberration is due to the Courts' failure to properly implement the mandates of the Fourth Amendment and that of 28 U.S.C. Section 1738 in giving a preclusive effect to

the State Court judgment, which undeniably, mandated the denial of respondents' motions for summary judgment.

Point III

THE DISTRICT COURT FAILED TO RESCHEDULE THE MOTIONS FOR SUMMARY JUDGMENT AND THEREFORE, PETITIONER, UNDER F.R.C.P., RULE 56(C), DID NOT DEFAULT IN OPPOSING SAID MOTIONS AND THE DISTRICT COURT'S FINDINGS TO THE CONTRARY WAS ERROR

The foregoing decisions are predicated upon facts that respondents' motions for summary judgment were granted by default. Pursuant to an Order of the District Court, the last date for the making of motions was set for the 25th day of January, 1985. Subsequently, Safeway obtained an ex parte Order extending respondents' time

in which to make motions to the 1st day of February, 1985 and the attorney for petitioner was not informed of said extension, either by Safeway or the District Court. While petitioner was advised that such an extension had been granted respondents, the record below is devoid of any such Order. If such an Order had issued, it should have been served upon all the parties and such service would have enabled petitioner to avoid the default. It should be noted that all previous and subsequent Orders of the District Court were in writing and served upon the parties.

On or about the 4th day of February, 1985, attorney for petitioner

was served with respondents' motions for summary judgment, which motions were properly rejected as being violative or the District Court's Order. On or about the 8th day of February, 1985, attorney for petitioner was advised by Mr. Fox, local counsel for UTU and Dize, that Safeway had obtained an ex parte Order extending the time in which to move and this was verified by the District Court on the 12th day of February, 1985, Judge Carter and his Scheduling Clerk having been out-of-state for the week of the 11th. However, the Scheduling Clerk advised said attorney's office that petitioner would be given "a sufficient time" to respond to the motions and

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repeated requests for a conference and clarification of the term "sufficient time", were to no avail. Finally, petitioner moved the District Court to grant him until the 10th day of April, 1985 to submit his opposition papers and said motion was denied, with the notation that one does not wait until he is in default to make such a motion.

On the appeal to the Court of Appeals for the Second Circuit, petitioner argued that pursuant to F.R.C.P., Rule 56(c), which provides that a motion for summary judgment shall be served at least 10 days before the time fixed for the hearing, that petitioner was not in default in

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answering the motion, as the District Court's assurance that petitioner would be given "a sufficient time" to interpose his opposition to the motions effectively vitiated the original return dates of the motions and that the District Court did not set any further hearing date, therefore, petitioner was not served at least 10 days before the time fixed for a hearing.

In disposing of this argument on the appeal, the Court of Appeals for the Second Circuit, found:

Under the circumstances, assessed in light of Hayes' prior dilatoriness in conducting the litigation, Judge Carter did not err in

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EDITOR'S NOTE

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no subsequent hearing date was set by the District Court. Admonitory in nature, the Circuit Court's finding does not address, nor resolve, the issue raised on the appeal, to wit: whether the District Court had set a day certain for the hearing of the motions to justify its finding that petitioner was in default. Petitioner respectfully contends that nothing in the ecord substantiates that the District Court rescheduled the hearing of the motions.

Assuming, arguendo, that it could be concluded that Mr. Hayes "acted at his peril in sending letters to the District Judge instead of either opposing the summary judgments in a

timely manner or making a timely motion for additional time", on the appeal, petitioner argued that the record amply demonstrated that even in the absence of opposing papers, the record before the District Court raised triable issues of fact which precluded summary judgment.

First, and foremost, the State Court judgment which exonerated petitioner from the charges of DUI and speeding, necessitated that those issues be given a preclusive effect pursuant to 28 U.S.C. Section 1738 and those issues should have been resolved in favor of petitioner. As is evident, from the Opinions fo the Circuit Court, and the District Court, the reasonableness of

respondents' actions were predicated upon the fact that petitioner was "driving while under the influence of alcohol and was speeding" at the time of the accident.

Second, Safeway, at its disciplinary hearing of July 13, 1983, had similarly concluded that petitioner lost control of his vehicle because he was driving under the influence of alcohol and speeding and that a test of the vehicle and its Safety Directors confirmed that the vehicle that petitioner was driving was in good operating condition. However, Safeway's own investigation revealed that from a stop, it was physically impossible for

its Safety Directors to attain a speed in excess of 25 mph (the legal limit). One of the Safety Directors who allegedly conducted the investigation and tried to recreate the circumstances of the accident, testified that the Mainenance Report on the vehicle showed that it was in good operating condition, when in fact, said Maintenance Report, made on May 5, 1983 the day after the accident, stated that" (18) Left drive wheel brake linnings (sic) were soaked with oil - bad seal". This report was made "prior" to the Safety Directors allegedly taking the vehicle out for the tests they allegedly conducted. The investigator testified that no repairs

were made to the bus prior to the tests.

Under the above stated facts, it must be logically concluded that Safeway's discharge of petitioner could not have predicated upon petitioner driving while under the influence of alcohol, or the allegation that petitioner was speeding. Its own Safety Reports negated such a finding and the State Court judgment confirmed those findings. Since petitioner's discharge could not reasonably be predicated upon DUI or speeding, it must further be logically concluded that Safeway's reasons for discharging petitioner laid elsewhere. That its contention that it discharged petitioner

for said reasons was merely pretextual and the inference of race discrimination was strongly indicated.

Reason for Granting the Writ

The Writ of Certiorari should be granted to clarify, and maintain the integrity of the numerous cases which have heretofore held that summary judgment is an appropriate remedy in cases where motive, intent and credibility are dispositive issues. The Court of Appeals for the Second Circuit's opinion in the instant case, casts a shadow over the previous, and well-established cases, which hold to the contrary and constitutes a reversal

of its own decision in Colby v. Klune, supra at p. 26. It may reasonably be argued even absent the State Court judgment which should have been given a preclusive effect, that the facts herein, construed in a light most favorable to petitioner, warranted the denial of the motions for summary judgment. In U.S. v Mitchell, 327 F. Supp. 476, 483 (D.C. Ga. 1971, the Court stated:

> The determination of each such case by the court requires discriminating judgment, not the mere application of an automatic formula or rule of thumb. Scarcely ever, therefore, in the view of this court,

can such a case be decided summarily with a full trial with all its nuances, where all the circumstances and credibility of each witness can be weighed and correct inferences drawn." (emphasis added)

Additionally, the record below clearly establishes that the District Court's deciding of the case was done in the absence of opposing papers which would have given said Court the required record necessary to enable it to properly decide the issues involved. In Pettinaro v. Construction Co. v. Delaware Authority for Regional Transit, 500 F. Supp. 559 (D.C. Del. 1980) the Court found that:

Cases premised on alleged violations of the constitutional or civil rights of plaintiffs frequently are unsuited for summary judgment because in these actions it is felt that a fuller record is necessary to be able to decide properly the issues involved. ... Altough summary judgment motions are never to be granted on the basis of inadequate and controverted factual records, when constitutional issues of large public import are involved, the court's scrutiny or the record, to ensure that there are no disputed issues of material fact, must be particularly exacting." (emphasis added)

The Orders herein

reasonably raise, and unsoundly refute, established case law on these issues and create questionable inferences as to where these decisions will lead Second Circuit courts in their determination of similar cases. The Second Circuit, in adding a footnote to its "Statement" that it does not constitute "a formal opinion" and "it shall not be reported, cited or otherwise used in unrelated cases before this or any other court", does little to dispel the precedent set by the District Court, whose judgment was affirmed in the Court of Appeal for the Second Circuit. The Orders of said Court will go a long way in confusing District Court in the Second Circuit as

to what is the applicable law and the instant case may well be perceived as a change of the law in the Second Circuit.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

FREDERICK C. HAYES, ESQ.
Attorney for Petitioner

January 9, 1986

Docket No. 85-7625

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of January one thousand nine houndred and eighty-five.

Present: HONORABLE ELLISWORTH VAN GRAAFELLAND,

HONORABLE JON O. NEWMAN,

HONORABLE ROGER J. MINER,

Circuit Judges,

BELTON CUNNINGHAM, JR.,
Plaintiff-Appellant,

v.

SAFEWAY TRAILS, INC., UNITED TRANSPORTATION UNION, WILLIAM C. DIZE, JR., VITO RIZZUTO and JOHN J. CARICCHIO,
Defendant-Appellees.

A petition for a rehearing having been filed herein by the Plaintiff-Appellant.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith
Clerk

Docket No. 85-7625
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of November one thousand nine houndred and eighty-five.

Present: HONORABLE ELLISWORTH A. VAN GRAAFEILAND,
HONORABLE JON O. NEWMAN,
HONORABLE ROGER J. MINER,
Circuit Judges.

BELTON CUNNINGHAM,
Plaintiff-Appellant,

v.

SAFEWAY TRIAL, INC., UNITED TRANSPORATION UNION, WILLIAM C. DIZE, JR., VITO J. RIZZUTO and JOHN J. CARICCHIO,
Defendants-Appellees.

O R D E R

Belton Cunningham appeals from a judgment of the District Court for the Southern District of New York (Robert L. Carter, Judge) dismissing his complaint on defendants' motions for summary judgment. His complaint alleges that his employer, Safeway Trials, Inc., two of its supervisory employees, Vito J. Rizzuto and John J. Caricchio, and his union, the United Transportation Union, and its chairman, William C. Dize, Jr., discriminated against him on the basis of his race and age. The complaint also alleges that the union breached its duty of fair representation.

1. Cunningham initially contends that Judge Carter erred in denying him an extension of time to file papers in opposition to defendants' motions for summary judgment and in declining to consider opposition papers that he filed notwithstanding denial of his extension request. Judge Carter had initially set January 25, 1985, as the cutoff date for motions. On February 1, defendants mailed copies of their summary judgment motions to counsel for plaintiff, Frederick C. Hayes, Esq. Attempts at hand delivery of these motions to Hayes were made on February 4. Asserting that the motions were untimely, Hayes adopted the perilous

course of returning them to the defendants, instead of opposing the motions on whatever grounds might be asserted, including untimeliness. On February 6, Hayes' law assistant learned indirectly that Judge Carter had granted an ex parte application by the defendants to extend the time for motions to February 1. Defendants had not served Hayes with notice of their request for an extension of time nor submitted to Judge Carter a proposed order granting their request, which, had it been available for endorsement and filing, would have given Hayes proper notice that the summary judgment motions were timely. On February 6, Hayes wrote

to Judge Carter requesting an immediate conference to clarify the situation concerning the schedule for motions. On February 25, Hayes' associate wrote Judge Carter renewing the request for a conference. The return dates for the summary judgment motions, February 22 and 28, passed without any response from Hayes or any request for extension of time to submit a response. On March 25, Hayes wrote Judge Carter requesting an extension until April 10 to respond to the summary judgment motions. On April 3, Judge Carter, treating the letter as a motion, denied it because Hayes had allowed the return dates to pass before requesting additional time. Undaunted,

Hayes filed opposing papers on April 29.

Under the circumstances, assessed in light of Hayes' prior dilatoriness in conducting the litigation, Judge Carter did not err in denying Hayes' request for additional time nor in declining to consider the tardy opposition papers. Though formal notification of the extension of time granted to the defendants would have been helpful, Hayes acted at his peril in sending letters to the District Judge instead of either opposing the summary judgments in a timely manner or making a timely motion for additional time.

2. In any event, we have

reviewed the opposition papers that Hayes has submitted and conclude that they contain nothing that would preclude the entry of summary judgment for the defendants. Cunningham was discharged because of an episode in which he drove one of the defendant's busses while under the influence of alcohol and crashed it into a building. His claims of race and age discrimination pursued unsuccessfully before various administrative forums, are spurious.

The judgment of the District Court is affirmed. Appellees are allowed their normal costs on appeal, which are to include the costs of preparing those portions of the

"Employers' Appendix," see Fed. R. App. P. 30(b), that were part of the record in the District Court.

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Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

OPINION
84 Civ. 3936 (RLC)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BELTON CUNNINGHAM,

Plaintiff,

-against-

SAFEWAY TRIALS, INC., UNITED TRANSPORATION UNION, WILLIAM C. DIZE, JR., VITO J. RIZZUTO and JOHN J. CARICCHIO,

Defendants

APPEARANCES

FREDERICK C. HAYES
Attorney for Plaintiff
250 West 57th Street
New York, New York 10019

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Attorneys for Defendant
Safeway Trials, Inc.
and Vito Rizzuto
520 Madison Avenue
New York, New York 10022

REGINALD E. JONES
Of Counsel

SHAPIRO SHIFF BEILLY
ROSENBERG & FOX
Attorneys for Defendant
United Transportation Union
and William C. Dize, Jr.
225 Broadway
New York, New York 10007

Local Counsel to
FRIEDMAN & WIRTZ
1211 Connecticut
Avenue, N.W.
Washington, D.C. 20026

WOODLEY B. OSBOURNE
Of Counsel

CARTER, District Judge

Plaintiff filed this complaint on June 5, 1984 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., alleging age[1] and race discrimination by his former employer, Safeway Trails, Inc. ("Safeway"), by Vito J. Rizzuto and John J. Caricchio, officers of Safeway, by plaintiff's union, the United Transportation Union ("UTU"), and by William C. Dize, Jr., UTU's chairman. Plaintiff also alleges a breach of duty of fair representation by UTU and Dize.

The court established December 7, 1984 as the discovery cut-off date; though plaintiff appears to have made some preliminary inquiries,

that date came and went without plaintiff having noticed any depositions, filed any documentary requests, or posed any interrogatory questons.

On February 1, 1985, defendants Safeway and Rizzuto[2] and defendants UTU and Dize filed two separate motions for summary judgment. The Safeway-Ruzzuto motion was returnable February 22, 1985; the UTU-Dize motion was returnable February 28, 1985. Plaintiff did not respond to either motion. But on March 22, 1985, one month after the return dates, plaintiff submitted two affidavits in opposition to the Safeway-Rizzuto

motion, without a "Rule 3(g) statement or a memorandum of law. In a letter to the court dated March 25, 1985, plaintiff's counsel requested that he be given until April 10 to respond to defendants' motions. On April 3, the court denied plaintiff's request, noting that "one does not wait until the default has occurred before requesting an extension of time to avoid being in default." The court stated that "[b]y not cotroverting defendants' Rule 3(g) statement, plaintiff may be held to have admitted whatever material facts are set forth by defendants."

Despite the court's clear denial of extra time to respond,

plaintiff filed further affidavits, a Rule 3(g) statement, and a memorandum of law on April 29, 1985.

In deciding defendant's motion, the court will not take into account any papers filed by plaintiff after February 28, 1985. Facts set forth in defendants' Rule 3(g) statement will be deemed to be admitted. See Davidson v. Keenan, 740 F.2d 129 (2d Cir. 1984); Woods v. State of New York, 469 F. Supp. 1127 (S.D.N.Y.) (Weinfeld, J.), aff'd mem., 614 F.2d 1293 (2d Cir. 1979).

The facts of this case, as set forth in defendants' Rule 3(g) statements, are as follows:

Plaintiff was employed by Safeway as a bus driver from December 14, 1971 until his termination in May, 1983. On May 4, 1983, after finishing his scheduled run at Washington D.C.'s National Airport at about 5:30 p.m., plaintiff was required (as per Safeway's standard operating procedure) to return his bus immediately to Safeway's garage in Northeast Washington, about six miles from the airport. At about 10:45 that night -- about five hours after he was supposed to have gone back to the garage -- plaintiff was involved in an accident while driving the bus he had not yet returned. At the intersection of Saratoga and Rhode Island Avenues, N.E.,

while trying to negotiate a right turn, plaintiff drove across two southbound traffic lanes, up and over a one-foot high curb, across a ten-foot wide grass median strip, down the curb on the other side of the median strip, across two northbound traffic lanes, over another one-foot high sidewalk curb, across fifteen feet of grass and pavement, and into a four-foot high brick retaining wall, wrecking the bus and partially demolishing the wall. No other vehicles were involved in the accident.

Police who arrived on the scene administered a field sobriety test, which plaintiff failed. He was handcuffed and taken to a police van,

where he was given a breathalyzer test at 1:00 a.m. and again at 1:30 a.m. The first test showed .11 percent alcohol in plaintiff's blood; the second showed .09 percent. Plaintiff was arrested and charged with driving while intoxicated.

Plaintiff told Dize, the union chairman, that he swerved to avoid hitting a motorbike. He said the accident occurred at 9:45, not 10:45, and that it took him four hours to travel the few miles because he took time to go to the bathroom and to buy a takeout dinner and because he was delayed by heavy traffic, an accident, and a funeral cortege. He denied having drunk alcohol before the accident,

though he admitted having consumed an alcohol-based medicine, and to having drunk alcohol after the accident.

The police accident report concluded that skid marks "indicate[d] excessive speed," that the "driver . . . proved to be intoxicated" and that the driver's "ability [was] impaired." Safeway's accident investigation concluded that the accident was preventable and that it had "resulted when [plaintiff] lost control of his coach due to a high rate of speed and driver under the influence . . . [H]ad [plaintiff] operated at a lower rate of speed and had not been drinking, said accident would have been avoided (speed

limit on Saratoga Avenue -- 25 mph)."

By letter dated May 12, 1983, Safeway notified plaintiff that he had been discharged for the following reasons: having been involved in a preventable accident, consuming alcohol while on duty, driving under the influence of alcohol, driving at an excessive speed, unauthorized custody and use of company equipment, and leaving the scene of an accident. Art. 16 § 1 of the collective bargaining agreement between UTU and Safeway permits Safeway to dismiss employees without a hearing in cases involving intoxication while on duty, but gives the employee a right to appeal.

On May 23, 1983, the driving-while-intoxicated criminal charges against plaintiff were dropped -- according to plaintiff's lawyer at the time, for reasons unrelated to the accuracy of the breathalyzer test. Two weeks later, a hearing was held on the civil traffic charges to inquire whether plaintiff's driver's license should be suspended or revoked. The traffic hearing officer determined in his discretion not to revoke or suspend plaintiff's license, but warned, "Don't come in here with a similar charge, because you won't get the same type of consideration."

Plaintiff contacted defendant

Dize and asked him to arrange a hearing with Safeway to appeal the dismissal. On May 26, 1983, Dize requested a hearing. Safeway initially refused, saying the request was not timely. Dize resisted and threatened to take the issue of timeliness to arbitration. Safeway acquiesced, and a hearing was held on July 13, 1983. Dize argued on plaintiff's behalf, and plaintiff spoke freely. Both cross-examined Safeway's witnesses. But no evidence was offered to contest the breathalyzer's findings. The dismissal was upheld.

On August 25, 1983, Dize appealed Safeway`s decision. A second hearing was held. No new evidence was

adduced, and plaintiff failed to give Dize names of any witnesses. At the hearing, plaintiff emphasized that the criminal charges against him had been dismissed, but provided no evidence as to the reason for the dismissal, and specifically, no evidence that the results of the breathalyzer test had been called into question. The appeal was denied.

On October 3, 1983, plaintiff asked the UTU to take his dismissal to binding arbitration. Under Article 16 of the collective bargaining agreement, it is within UTU must split the costs with Safeway. Dize requested arbitration on October 29, 1983 but he

informed plaintiff that plaintiff would need to produce new evidence to overcome the damning breathalyzer tests. Plaintiff failed to do so, and on January 4, Dize withdrew UTU's request for arbitration.

While plaintiff was pursuing his appeals with Safeway, he was also attacking his discharge on other fronts. On August 2, 1983, plaintiff filed a charge with the EEOC contending that he had been discriminated against because of his race (black) and age (48). On April 6, 1984, the EEOC informed plaintiff that it had found no cause to believe his complaint. On March 13, 1984, plaintiff filed charges with the

NLRB alleging that the UTU's refusal to arbitrate constituted a breach of its duty of fair representation. On April 19, 1984, following on NLRB investigation, plaintiff withdrew the charges.

Plaintiff now alleges that Safeway and its officials discriminated against him based on race because "upon belief, similarly situated Caucasian employees are not penalized in the same manner for violations of Company Rules and Regulations" (Complaint ¶ 15). He alleges that UTU and Dize also discriminated against him based on race when they refused to take his case to arbitration. Plaintiff also alleges

that "his age (48) was a critical factor in defendants' determination and condonation of his unlawful discharge" (Complaint ¶ 20). Finally, plaintiff accuses UTU of breaching its duty of fair representation to him by refusing to arbitrate.

DISCUSSION

1. The Safeway-Rizzuto Motion

The standard for liability in Title VII disparate treatment cases in outlined in McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973). First, the plaintiff bears the burden of proving a prima facie case of racial discrimination, which requires, in essence, that he show that he belongs to

a racial minority and that he was treated differently from similarly-situated whites. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to show a legitimate non-discriminatory reason for his action, whereupon the burden shifts back to the plaintiff to show that the defendant's articulated reasons are pretextual. See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); Martin v. Citibank, N.A., Nos. 84-7676, 84-7700, slip op. at 9 (2d Cir. May 15, 1985).

Assuming arguendo that plaintiff could establish a prima facie case of race or age discrimination (and

the court is by no means satisfied that he could), defendant Safeway and its employees have clearly met their burden to articulate legitimate non-discriminatory reasons for plaintiff's discharge. It is difficult to imagine a more compelling case for the discharge of an employee, particularly a bus driver, than that which is presented by the instant case. Plaintiff disappeared with his bus for five hours, he was involved in a serious, preventable accident, and apparently he was speeding and driving while intoxicated. "It cannot be said that a company whose business it is to transport passengers by common carrier

and who is obliged to use the highest degree of care for their safety, does not have a legitimate business reason in exercising extreme care in the selection of its drivers." Heath v. Greyhound Lines, 17 Fair Empl. Prac. Case. (BNA) 812, 814 (S.D. Ohio 1978).

The burden is therefore on the plaintiff to show that defendants' stated reasons are pretextual, i.e., that they mask the true discriminatory intent. Plaintiff may establish pretext in a variety of ways, including comparative evidence (showing that white or younger employees with similarly poor work performances were not discharged), statistical evidence (showing that the

employer had a pattern or practice of discrimination against persons of plaintiff's race or age), and/or direct evidence (showing subjective intent). Wade v. New York Telephone, 500 F. Supp. 1170, 1177-78 (S.D.N.Y. 1980) (Carter, J.) (citations omitted).

Here, plaintiff has offered no basic evidentiary facts -- comparative, statistical, or direct -- sufficient to allow an inference of discriminatory intent. Plaintiff's only evidence regarding racial discrimination is a list of fourteen purported "other incidents of company rules [sic] infractions by Caucasian drivers still in the employ of defendant." But the

list itself does not allege any incidents as serious as plaintiff's, involving a combination of unauthorized use of company property, speeding, drunk driving, and involvement in a serious and preventable accident, so the white drivers listed can hardly be said to be comparable with plaintiff. As to age discrimination, plaintiff's only evidence is his "belief" that because of his age he was only months away from vesting in Safeway's pension plan and that Safeway wished to fire him before that could occur. Even a cursory examination of the facts by plaintiff or his counsel would have revealed that according to the terms of the plan,

plaintiff's interest in the plan was not going to vest until May, 1992, nine years after he was fired.

It is true that "summary procedures should be sparingly applied where intent and state of mind are significant." Nash v. Jacqueline Cochran, Inc., 548 F. Supp. 676, 678 (S.D.N.Y. 1982) (Weinfeld, J.). See also Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 473 (1962). But this "dose not mean that a party against whom summary judgment is sought is entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he

can produce evidence to enable him to reach the jury with his claims." Nash v. Jacqueline Cochran, Inc., supra, 548 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). To prevent summary judgment, "there must be some basic evidentiary fact to permit the trier of the fact to draw a reasonable and permissible inference of intent to discriminate." Nash v. Jacqueline Cochran, Inc., supra, 548 f. Supp. at 680.

It would be futile to allow the case against Safeway and Rizzuto to go to trial. Plaintiff has mustered no evidence sufficient to permit a jury to infer intent to discriminate. Since the

discovery cut-off date has long passed, plaintiff cannot argue that he may yet elicit such evidence before trial. And a mere desire by plaintiff to question defendants at trial in hopes of developing such evidence is not sufficient to bar summary judgment. Id. at 678. To allow this case to go to the jury would be to permit a verdict based on "sheer surmise and conjecture." Mattivi v. South African Marine Corp., "Huguenot", 618 F.2d 163, 168 (2d Cir., 1980). In fact, were a jury to return a verdict in favor of plaintiff in this case, the court would be constrained to grant judgment n.o.v. Martin v. Citibank, supra, slip op. at 10-15;

Parcinski v. Outlet Co., 673 F.2d 34, 36-37 (2d Cir. 1982); Nash v. Jacqueline Cochran, Inc., supra, 548 F. Supp. at 681. Accordingly, the Safeway-Rizzuto motion for summary judgment is granted. See Kelly v. American Federation of Musicians' and Employers' Pension Welfare Fund, 602 F. Supp. 22, 24-25 (S.D.N.Y.) (Duffy, J.); Nash v. Jacqueline Cochran, Inc., supra, 548 F. Supp. at 680-81; Wade v. New York Telephone, supra, 500 F. Supp. at 1177. See also Schering Corp. v. Home Insurance Co., 712 F.2d 4, 9 (2d Cir. 1983) ("[i]f the opponent fails to substantiate the existence of a genuine dispute, a proper concern for judicial

efficiency and the mandate of Rule 56(c) require summary disposition of the issue").

2. The UTU-Dize Motion

Plaintiff's Title VII case against UTU-Dize is even less adequate than his case against Safeway and Rizzuto. Plaintiff has not shown any evidence suggesting that his race figured in UTU's and Dize discriminated against plaintiff because of his age makes no sense -- even if plaintiff's rights in the pension plan were about to vest, that would not have given the union (as opposed to Safeway) a motive to discriminate against plaintiff. Plaintiff has simply made a bold

assertion -- that UTU and Dize discriminated against him based on race and age -- and has utterly failed to offer any supporting evidence. "It is not sufficient merely to assert a conclusion without supplying supporting arguments or facts in opposition to [a] motion [for summary judgment]." S.E.C. V. Research Automation Corp., 585 F.2d. 31, 33 (2d Cir. 1978).

Even if plaintiff could make out a prima facie case of discrimination, UTU and Dize have clearly demonstrated a legitimate non-discriminatory reason for refusing to arbitrate--plaintiff could provide no friendly witnesses, he could not

challenge the breathalyzer results, and he had already lost twice at Safeway hearings with the story he wanted to present yet again. The union, reasonably, did not want to take such a case to arbitration.

What is more, UTU and Dize have offered statistical evidence rebutting any inference of discriminatory intent. During Dize's incumbency with Safeway, the company discharged fifty-one bus drivers, thirty-three of whom were black, sixteen of whom were white, and two of whom were Hispanic. Of the fifty-one discharges handled by UTU during Dize's incumbency, twenty-seven were reinstated as a result

of the grievance process with and without arbitration. Of those, fifteen were black, ten were white and two were Hispanic. Of the fifteen cases which Dize submitted to arbitration, ten were black and five were white. Nine of these were withdrawn, of which six were black and five were white. Five of these cases were withdrawn on settlement in which three black drivers and two white drivers were reinstated. Four were withdrawn for want of merit, including plaintiff's case. Of these four, three involved black drivers and one involved a white driver (UTU-Dize's Rule 3(g) statement ¶ ¶ 60-62). These statistics, coupled with Dize's

representation of plaintiff in the two hearings before Safeway, and his willingness to take the issue of timeliness to arbitration when Safeway initially refused to hear plaintiff's appeal, belie any claim that Dize discriminated against plaintiff.

As to plaintiff's argument that UTU and Dize breached their duty of fair representation, the judicial inquiry is whether the defendants' conduct was "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967); Jensen v. Farrell Lines, Inc., 658 f.2D 27 (2d Cir. 1981). Though "a union may not arbitrarily ignore a meritorious grievance or

process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration." Vaca v. Sipes, supra, 356 U.S. at 191. The court must allow the union representative a "board range of reasonableness." Ford Motor Corp. v. Huffman, 345 U.S. 330, 338 (1953).

There is no evidence in the record to allow a jury to infer an intent to discriminate, nor is there any evidence in the record to allow a jury to infer that defendants' conduct was arbitrary, discriminatory, in bad faith, or outside the range of reasonableness. consequently, UTU-Dize's motion is

granted.

CONCLUSION

The court is fully mindful that the summary judgment rule may not be applied to deprive a litigant of his right to trial whenever a genuine issue of fact exists. But there can be no question in this case that defendants acted for legitimate, non-discriminatory reasons; no reasonable jury could find intent to discriminate by either Safeway-Rizzuto or UTU-Dize or a breach of UTU-Dize's duty of fair representation. "[N]either courts nor defendants should be subjected to trials which can be little more than harassment." Applegate v. Top

Associates, 425 F.2d 92, 96 (2d Cir. 1970). Defendants' motions for summary judgment are granted.

This case is frivolous. It has consumed time and expense in costs and fees. It has harassed defendants and burdened the court. The court has only narrowly decided against plaintiff and his counsel pursuant to Rule 11, F.R.Civ.P. Instead, pursuant to 28 U.S.C. Section 1927, the court hereby assesses against plaintiff's counsel all costs and fees incurred by defendants after February 28, 1985, the return date which plaintiff's counsel ignored. The court retains jurisdiction over the case to resolve any disputes as to costs and

fees.

IT IS SO ORDERED.

Dated: New York, New York

June 12, 1985

ROBERT L. CARTER

U.S.D.J.